



February 13, 2001

Mr. Jerome H. Supple  
President  
Southwest Texas State University  
601 University Drive  
San Marcos, Texas 78666-4615

OR2001-0533

Dear Mr. Supple:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144117.

Southwest Texas State University (the "university") received a request for the following categories of information:

- (1) all communications between the Grievance Committee and certain university administrators since September 1, 2000;
- (2) all communications between the Grievance Committee and Space Committee members of Biology since September 1, 2000;
- (3) all communications concerning the requestor between the Dean of Science and the Executive Committee of Biology, members of the Personnel Committee of Biology, and the university's upper administration since January 1, 2000;
- (4) any report produced by the Office of the Dean of Science investigating charges made against the requestor by the Executive Committee of the Biology Department or any other Biology Department faculty member;
- (5) all notes taken by specified faculty members about meetings held with the Dean of Science in the Spring of 2000 concerning the possible termination of the requestor;
- (6) all communications made since August 1, 1999, between the chair of the Biology Department and the Executive and Personnel Committees of Biology concerning the requestor; and
- (7) a copy of an assistant dean's report concerning allegations brought by a named student against the chair of the Biology Department.

First, you state that you do not have information responsive to categories five and seven of the request. Although the requestor argues these documents do exist, we cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Consequently, we find that the Public Information Act does not require the university to disclose information responsive to categories five and seven of the request because, according to the university, this information did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). With respect to the information the university does possess, you claim that the information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under 552.103(a).

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983).

You have provided this office with copies of four documents that you contend demonstrate that litigation is reasonably anticipated. In the first document, a letter written on May 12, 2000, by the requestor's attorney to the university's vice president of academic affairs, the requestor's attorney indicated that he would sue certain university faculty members if the requestor was terminated. However, it does not appear that the requestor has been terminated since this letter was sent, nor have you indicated that the requestor will be terminated. In the next document, a September 2, 2000 email from the requestor to the university's attorney, the requestor complained about the university's allocation of research space and merely indicated that a letter from the university concerning the allocation of space "may be used in evidence to any attorney." In another email dated November 16, 2000, the requestor expressed displeasure with the university's denial of certain grievances, but also expressed that he wished to keep the grievances within the university, rather than contacting an attorney. Furthermore, in a November 28, 2000 email, the requestor indicated that he had taken his research space and performance raise grievances to the university's auditor and the state auditor. He also indicated that he would be contacting the district attorney concerning a claim of official oppression and that the Office of Attorney General had already been contacted concerning possible discriminatory practices. Nevertheless, there is no indication that either the district attorney or the Attorney General has taken any affirmative action with respect to these claims. Finally, although the requestor threatened litigation in his November 28, 2000 email when he stated that a student "has filed a slander/libel lawsuit against [the chair of the Biology Department] and my lawsuit will be filed after this one is completed," it appears that the requestor was threatening suit against the chair of the biology department, not the university. Furthermore, you have not indicated, nor is it apparent on the face of the email, that the threat was made against the chair in his capacity as a university employee.

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Based on your arguments and our review of the submitted correspondence, we cannot determine that the university or an officer or employee of the university, as a consequence of the person's employment, is or may be a party to pending or reasonably anticipated litigation. Therefore, you may not withhold the requested information under section 552.103 of the Government Code. Because you have raised no other exceptions, you must release the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

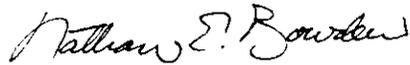
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/er

Ref: ID# 144117

Encl: Submitted documents

cc: Mr. Samuel Tarsitano  
Southwest Texas State University  
Department of Biology  
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(w/o enclosures)